Supreme Court, U.S.
FILED
JAN 24 2000
CLERK

(3)

No. 99-869

IN THE
Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AT&T CORP. and MCI WORLDCOM, INC. IN OPPOSITION

MARK C. ROSENBLUM
ROY E. HOFFINGER
JAMES H. BOLIN, JR.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

DAVID W. CARPENTER *
PETER D. KEISLER
DANIEL MERON
SIDLEY & AUSTIN
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7237

Counsel for Respondent AT&T Corp.
(Additional Counsel appear on inside cover)

January 24, 2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

23pp

DONALD B. VERRILLI, JR.
JEROME L. EPSTEIN
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

THOMAS F. O'NEIL III
MCI WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Counsel for Respondent MCI WorldCom, Inc.

QUESTION PRESENTED

Whether the Federal Communications Commission ("FCC") reasonably concluded that U S WEST violated the statutory provision prohibiting it from "provid[ing]" long-distance service, 47 U.S.C. § 271(a), when U S WEST entered into an arrangement in which, among other things, it packaged a long-distance service under its brand name, set the price and other terms of that service, marketed and recommended that service to its customers, advised the customers that subscribed to that service that it had thereby become their "long distance . . . provider," profited from that service, and served as the single point of contact for the initial and all subsequent customer communications.

STATEMENT REQUIRED BY RULE 29.6

AT&T Corp. ("AT&T") is a telecommunications carrier. AT&T has no parent company. No publicly held company owns 10% or more of AT&T's stock.

MCI WORLDCOM, INC. is a Georgia corporation which, along with wholly owned subsidiaries, provides local and long distance telecommunications services domestically and internationally. MCI WorldCom is a publicly traded company on the NASDAQ National Market under the symbol "WCOM." MCI WorldCom has no parent corporations. No publicly held company owns 10 percent or more of MCI WorldCom stock. MCI WorldCom owns a controlling interest in Embratel Participacoes S.A., which issues shares to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT REQUIRED BY RULE 29.6 ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 9

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Page

AT&T Corp. v. *Ameritech Corp.*,
No. 98 C 2993 (N.D. Ill. Oct. 22, 1999) 9

AT&T Corp. v. *Iowa Util. Bd.*,
119 S. Ct. 721 (1999) 5,11

Babbitt v. *Sweet Home Chapter of Communities for a Greater Or.*,
515 U.S. 687 (1995) 11

Bragdon v. *Abbott*,
524 U.S. 624 (1998) 13

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*,
467 U.S. 837 (1984) 2

Dunn v. *CFTC*,
519 U.S. 465 (1997) 11

INS v. *Aguirre-Aguirre*,
119 S. Ct. 1439 (1999) 11

Medtronic, Inc. v. *Lohr*,
518 U.S. 470 (1996) 11

NLRB v. *Town & Country Elec., Inc.*,
516 U.S. 85 (1995) 11

National Fed'n of Fed. Employees, Local 1309 v. *Department of the Interior*, 119 S. Ct. 1003 (1999) 11

NationsBank, N.A. v. *Variable Annuity Life Ins. Co.*,
513 U.S. 251 (1995) 11

Reno v. *Koray*,
515 U.S. 50 (1995) 11

United States v. *AT&T*,
552 F. Supp. 131 (D.D.C. 1982), *aff'd*,
460 U.S. 1001 (1983) 4

United States v. *Haggar Apparel Co.*,
119 S. Ct. 1392 (1999) 11

United States v. *LaBonte*,
520 U.S. 751 (1997) 11

United States v. *O'Hagan*,
521 U.S. 642 (1997) 11

United States v. *Western Elec. Co.*,
627 F. Supp. 1090 (D.D.C. 1986) 4

United States v. *Western Elec. Co.*,
675 F. Supp. 655 (D.D.C. 1987), *aff'd*,
894 F.2d 1387 (D.C. Cir. 1989) 4

FEDERAL STATUTES

Telecommunications Act of 1996,
Pub. L. No. 104-104, 110 Stat. 53 5

47 U.S.C. §§ 251-61 4
§ 271 1,5
§ 275 13

SCHOLARLY AUTHORITY

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989) 14

OTHER AUTHORITIES

Random House Unabridged Dictionary (2d ed. 1993) ... 12

John J. Keller & Stephanie N. Metha, *U S West Strikes Marketing Alliance With Quest in Bold Move Skirting Rules*, Wall St. J., May 7, 1998 6

Dow Jones News Serv., *AT&T, MCI Others Sue Ameritech Over Qwest Marketing Pact* (May 14, 1998) 6

IN THE
SUPREME COURT OF THE UNITED STATES

No. 99-869

U S WEST COMMUNICATIONS, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AT&T CORP. and MCI WORLDCOM, INC. IN OPPOSITION

STATEMENT OF THE CASE

This case concerns an attempt by two Bell Operating Companies ("BOCs") to provide long distance service (also known as "interLATA" service or "interexchange" service) in violation of Section 271(a) of the Communications Act. Section 271(a) states that no BOC may "provide interLATA services" except upon compliance with certain preconditions that, all parties agree, these BOCs have not yet met. 47 U.S.C. § 271(a). Those preconditions require the FCC to find, *inter alia*, that the BOCs have opened their monopoly markets for local telephone service to competition. In addition to providing an incentive for the BOCs to comply with the market-opening

requirements of the Act, Section 271 protects long-distance competition by prohibiting the BOCs from offering customers a combined package of local and long distance services until long-distance carriers can likewise offer such packages in competition with them.

Petitioner U S WEST and another BOC, Ameritech Corp., entered into arrangements with Qwest Communications Corporation ("Qwest"), a long distance carrier, in which they offered packages of long-distance and local service that no other carrier could match. In particular, U S WEST packaged Qwest's long-distance service under its own brand name, set the price and other terms of that service, marketed and recommended that service to its customers, advised its customers that U S WEST would then become their "long distance . . . provider," profited from that service, and served as the single point of contact for the initial and all subsequent customer communications. Pet. App. 23a-34a & n.70. U S WEST nonetheless contended that it could not be held to be "providing" long distance service under § 271(a) as long as Qwest continued to engage in the actual long-distance transmission. The FCC rejected that contention, and the court of appeals upheld its decision as "clearly reasonable." *Id.* at 6a.

The decision below presents no conflict with any decision of any other court, and no issue beyond the correctness of the D.C. Circuit's review of the FCC's application of § 271(a) to the specific facts of this case. U S WEST nonetheless seeks further review of this intensely factbound case on the ground that it is allegedly symptomatic of a broader phenomenon in which courts of appeals "manipulate" this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so as to accord excessive deference to administrative agencies. U S WEST even claims that this putative phenomenon is leading to widespread

violations of the nondelegation doctrine. Its nondelegation claim, however -- which it did not raise below until its petition for rehearing -- is simply a claim that the FCC assumed "lawmaking powers" by applying a statute differently than U S WEST believes Congress intended, and is thus simply a more grandiose version of U S WEST's uncertworthy claim that the agency in this case has misapplied a statute to a particular set of facts before it.

Most fundamentally, even if the asserted phenomenon of excessive deference by courts of appeals generally actually existed -- and U S WEST makes no showing that it does -- this case would be an exceptionally poor vehicle for addressing it. Even if there were no *Chevron* doctrine and no deference, the FCC's application of the statute here would have to be affirmed as clearly correct.

1. U S WEST and Ameritech, like the other BOCs, have monopolies over local telephone facilities and services in their respective regions. If the BOCs could provide long-distance services while these local telephone monopolies are intact, they could monopolize the long-distance business of the large number of customers who want to engage in "one-stop shopping" and obtain local and long distance service from a single source.

The BOCs' ability to do so is enhanced by their monopoly over the "customer care" channels. Customers in a BOC's service area need to call the BOC whenever they wish to order local service, obtain a new line, add a calling feature such as call waiting, or arrange for repair of their service. This is also the means through which most customers today order long distance service. If BOCs could use this channel to promote a particular long-distance service, they could artificially shift vast arrays of long distance business. These points are

vividly confirmed by the facts of this case. In the brief four-week period before its activities here were enjoined, U S WEST signed up over 130,000 customers for its package of local and long distance service (Pet. App. 34a), even though Qwest's long distance service had not enjoyed even remotely comparable success when it was previously offered directly by Qwest.

For these and other reasons, the consent decree under which the former Bell System was broken up (also known as the Modification of Final Judgment or "MFJ") prohibited BOCs from "providing" long-distance services until such time as they "los[t] the ability to leverage" a local monopoly into the long-distance market. *United States* v. *AT&T*, 552 F. Supp. 131, 194-95 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). While the MFJ was in effect, the BOCs repeatedly made the same claims about the meaning of the prohibition against "providing" long-distance services that U S WEST advances in its petition. The courts rejected these claims. Applying a *de novo* construction of the terms of the MFJ, they held that the long-distance services restriction barred the BOCs from engaging in any aspect of the provision of long distance services, not merely the transmission of long-distance calls. See, *e.g.*, *United States* v. *Western Elec. Co.*, 675 F. Supp. 655, 665-66 (D.D.C. 1987) (construing the term "provide" as "synonymous with marketing or selling"), *aff'd*, 894 F.2d 1387 (D.C. Cir. 1989); *United States* v. *Western Elec. Co.*, 627 F. Supp. 1090 (D.D.C. 1986) (prohibiting arrangement under which a BOC would market and manage a package of telecommunications services, including long-distance service transmitted by another carrier).

2. In 1996, Congress enacted a new subchapter of the Communications Act that is designed to foster competition in the provision of local telephone service. 47 U.S.C. §§ 251-61. Those provisions require the BOCs and other monopoly local exchange carriers to open their markets to competition by,

among other things, permitting competing carriers to obtain access to their network facilities and to use those facilities at the same cost and other terms that the BOC enjoys to provide competing services. See *AT&T Corp.* v. *Iowa Util. Bd.*, 119 S. Ct. 721, 726 (1999).

Although it superseded the MFJ, the 1996 Act, too, seeks to prevent BOCs from using their local monopolies to harm long distance competition. In particular, although § 601(a) prospectively terminated the MFJ, it provides that BOCs are prospectively subject to "restrictions and obligations" of the Communications Act[1] which, under other provisions of the 1996 Act, codify the core of the MFJ's long-distance restriction.

Specifically, § 271(a) states that a BOC may not "provide interLATA services except as provided in this section." See 47 U.S.C. § 271(a). In turn, § 271 provides for only three sets of narrow exceptions, none of which is at issue here. See 47 U.S.C. § 271(b)(2),(3), 271(g), 271(f). Section 271 also sets forth the standards and procedures that will govern any request to remove the remainder of the long distance restriction. It conditions any grant of long-distance authority on the BOC making a showing to the FCC that it has satisfied statutory requirements for opening its local markets to competition. See 47 U.S.C. § 271(c)(2)(B), 271(d)(3).

3. U S WEST has never obtained Section 271 authority from the FCC. On May 6, 1998, however, U S WEST declared that it had found the market-opening requirements of the Act "'cumbersome,'" and announced it would immediately

---

[1] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143.

implement an alliance with Qwest.[2] (U S WEST and Qwest have since announced that they will merge. Pet. 8 n.7.) Ameritech, which likewise had never received section 271 authority, made the same announcement several weeks later. Under these "alliances," these BOCs offered customers a service package that consisted of local and other services (transmitted by the BOC) and long-distance services (transmitted by Qwest). The BOCs used their brand names -- "U S WEST Buyer's Advantage" and "Ameritech CompleteAccess" -- to describe and market the entire package of services. Pet App. 9a, 13a. They engaged in a range of promotional activities, including inbound telemarketing (in which customers who called the BOCs to order local service or for other reasons were urged to purchase the package), outbound telemarketing (in which the BOCs called customers), and television and print advertising. U S WEST's marketing representatives concluded those calls by telling its customers: "Thank you for calling U S WEST Communications, your local, long distance and inter-net *provider*." *Id.* at 34a n.70 (emphasis added).

The competitive strategy behind these alliances was self-evident, and was confirmed by the BOCs' internal planning documents. In particular, each BOC perceived great advantages in being the only carrier in its region able to provide one-stop shopping. Ameritech hoped to "'beat [the] Big-3 IXCs [*i.e.*, "interexchange carriers"] to the mass market with a full service offer before IXCs can leverage their customer relationship to sell local.'" Pet. App. 28a & n.42 (first alteration in original). U S WEST likewise sought to "'provid[e] the convenience of one-stop shopping'" through a

---

[2] *See* John J. Keller & Stephanie N. Mahta, *U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules*, Wall St. J., May 7, 1998 at A2.

combination that "will initially allow [U S WEST] to become an interLATA carrier for customers." *Id.* at 32a, 58a (second alteration in original).

For its part, Qwest projected that each alliance would bring it up to $200 million or more in revenue in 1999 alone.[3] It therefore willingly ceded to each BOC effective control of the terms and conditions of the long-distance component of the package. Each BOC established detailed parameters on service quality and performance to which Qwest was required to agree. Pet. App. 65a-66a. The BOCs also established, and exercised prospective control over, the long-distance price. *Id.* at 28a n.45, 33a, 63a-66a. And the BOCs also assumed an unprecedented role in providing "customer care" -- follow-up responses to customer concerns -- providing "all customer support (sign-up and servicing) through the BOC's own toll-free number." *Id.* at 2a.

Further, U S WEST's assertion here that it did not share in the long-distance revenues (Pet. 10) is highly misleading. In the original contract between U S WEST and Qwest, Qwest agreed to pay U S WEST both a flat fee for each customer signed up for the service and additional biannual payments based explicitly upon each customer's long distance revenues. After this litigation commenced, U S WEST required a modification to the contract that eliminated the payments based on the level of long-distance revenues, but that correspondingly increased the flat customer charge with the objective of assuring

---

[3] *See* Dow Jones News Serv., *AT&T, MCI Others Sue Ameritech Over Qwest Marketing Pact* (May 14, 1998).

that the new contract would have the same "net present value" to U S WEST as did the previous, explicitly revenue-based one.[4]

4. The FCC held that these BOCs had violated Section 271(a). After reviewing a voluminous record, it found "that Ameritech and US WEST (a) designed and developed a package of services that would include a long distance component; (b) selected the carrier to transmit the long distance service; (c) established, and exercised prospective control over, the price, terms, and conditions under which the long distance component would be offered; (d) served as the initial and primary point of contact for the customer for all service inquiries for the combined offering; (f) [sic] relied on their brand names in marketing the combined offering; and (g) expressly recommended Qwest's long distance service." Pet App. 13a-14a. And it had little difficulty in concluding that the BOCs were therefore "providing" long distance service regardless of whether Qwest was responsible for transmission. It reached that conclusion because each of these BOCs was "effectively holding itself out as a provider of long distance service," "performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public," and obtaining those benefits that are "uniquely associated with the ability to include a long distance component in a combined service offering." *Id.* at 54a, 55a-71a.

The FCC further found that its conclusion that these activities constituted the unlawful "provision" of long-distance service was compelled by the statutory scheme and purpose.

---

[4] *See* Deposition of Stephen Michael Jacobsen at 73-74, *AT&T Corp.* v. *U S WEST Communications, Inc.*, C98-634WD (W.D. Wash. June 5, 1998).

"By conditioning BOC entry into the in-region, interLATA market on whether the local market is open to competition, Congress sought to ensure that, when the BOCs obtain authorization to provide long distance services, and thereby offer one-stop shopping, new entrants would also have the opportunity to provide a combined package of telecommunications services to consumers." Pet App. 56a. It found that adopting the BOCs' claims would impede competition by enabling the BOCs to "use[] their control of the local bottleneck to gain an unfair advantage," and would destroy the "carefully balanced incentive structure" that Congress created. *Id.* at 24a, 56a.

On petitions for review filed by U S WEST, Ameritech, and Qwest, the court of appeals affirmed. Contrary to U S WEST's suggestion that the court of appeals did so reluctantly (Pet. 3), the court held that the FCC's approach was "clearly reasonable." Pet. App. 6a. Subsequent to that decision, as part of a settlement, Ameritech and Qwest consented to entry of an order holding that Ameritech had "provided interLATA services in violation of Section 271." *AT&T Corp.* v. *Ameritech Corp.*, No. 98 C 2993 (N.D. Ill. Oct. 22, 1999) (Order). Only U S WEST has continued to challenge the decision.

REASONS FOR DENYING THE PETITION

The tendentious "Question Presented" by U S WEST -- whether it is proper for a court to "rel[y] on *Chevron* . . . to defer to an agency decision on the basis of a fictitious statutory ambiguity manufactured by the agency to accommodate its own policy preferences" (Pet. i) -- obviously presents no issue about which any parties or circuits disagree. It is common ground that "fictitious" and "manufactured" ambiguities are

impermissible. This petition thus presents only the factbound and uncertworthy question of whether this particular case was an instance of such "reliance."

Undoubtedly recognizing this, U S WEST attempts to sell this case instead as an opportunity for a broader examination of the *Chevron* doctrine. However, it does not ask for *Chevron* to be overruled. Instead, it contends that *Chevron* was "manipulated" by the court of appeals. Pet. 2. U S WEST therefore is complaining only about the application of settled law to the facts of this case. And U S WEST's attempt to dress up the decision below as involving a "wholesale transfer[] of lawmaking power" and a "violation of the nondelegation doctrine" (*id.* at 2) adds nothing to that analysis. Such grandiose assertions can always theoretically be made, at least in the derivative way U S WEST makes them here, whenever a party wishes to claim that an agency has misapplied a statute -- for they ultimately amount to nothing more than the uncontroversial observation that the Constitution requires agencies to adhere to congressional enactments.[5]

U S WEST is thus left with its claim that this case merits review because it is allegedly symptomatic of a broader trend in which courts of appeals are giving agencies more deference than *Chevron* does or should permit. There are two dispositive and fundamental problems with this claim.

First, the trend U S WEST decries does not exist. This Court's decisions point in the opposite direction. In the last five years (*i.e.*, back through the beginning of the 1994 Term), the

---

[5] The nondelegation claim is a particularly inappropriate add-on in this case. There is no discussion of, or holding on, the nondelegation doctrine in the decision below. That is because U S WEST raised it for the first and only time in its petition for rehearing after the court of appeals' decision issued.

Court has reversed courts of appeals in 12 cases involving the application of *Chevron*. In 10 of those cases, the Court reversed because the court of appeals failed to accord the agency *sufficient* deference.[6] Only 3 of the reversals (including one case that is included in both categories because it involved multiple issues) involved excessive deference.[7] Thus, it is hardly surprising that U S WEST makes no effort to prove its extravagant claims.

Second, even if there were such a trend, this case could not remotely be part of it. U S WEST's argument is that the term "provide" in Section 271(a) has a clear meaning that cannot encompass the activities in which it engaged, and that only "manufactured" ambiguities and servile judicial deference could have produced a result finding its conduct unlawful. That is nonsense. The record established that U S WEST had dictated every significant term of the long distance offering, bundled that offering with its own local services under its own brand name, replaced Qwest as the principal customer interface both at the initial sale and for follow-up communications, indirectly shared interexchange revenues with Qwest, and obtained present and future competitive advantages over long-

---

[6] *See INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1448 (1999); *United States* v. *Haggar Apparel Co.*, 119 S. Ct. 1392, 1398 (1999); *National Fed'n of Fed. Employees* v. *Department of the Interior*, 119 S. Ct. 1003, 1011 (1999); *AT&T Corp.* v. *Iowa Util. Bd.*, 119 S. Ct. 721, 733, 738 (1999); *United States* v. *O'Hagan*, 521 U.S. 642, 666-67 (1997); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495-97 (1996); *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 98 (1995); *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 708 (1995); *Reno* v. *Koray*, 515 U.S. 50, 60-61 (1995); *NationsBank, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 264 (1995).

[7] *See Iowa Util. Bd.*, 119 S. Ct. at 734-36; *United States* v. *LaBonte*, 520 U.S. 751, 755-57 (1997); *Dunn* v. *CFTC*, 519 U.S. 465, 470 (1997).

distance carriers and competing local exchange carriers by ubiquitously offering "one-stop shopping" before any other carrier could economically do so. Indeed, the FCC found that "[t]he only long distance function the [BOC] defendants do not perform under their respective arrangements is the actual transmission of calls across LATA boundaries." Pet. App. 67a.

U S WEST's argument -- and the only theory under which its conduct could be found permissible -- is therefore that the term "provide" in Section 271(a) must be read solely to mean "transmit" (or "resell transmission"). Pet. 19.[8] But the FCC and the court of appeals properly employed all the traditional tools of statutory construction -- text, legislative history, statutory structure and purpose -- in rejecting this implausible claim.

To begin with, U S WEST's claim is contradicted by the statutory language. Congress did not prohibit merely "transmission." It prohibited carriers from "providing" interLATA service. The dictionary defines "provide" as, among other things, to "make available" or "arrange for."[9] Here, U S WEST plainly arranged for long-distance service for its customers and made that service available without transmitting the long-distance calls itself. This understanding of

---

[8] U S WEST elsewhere seeks to obscure the issue by focusing on the definition of "interLATA service." Pet. 7. But as the court of appeals explained, there is no dispute about the definition of "interLATA service" -- the issue is what it means to "provide" such a service. Pet. App. 5a.

[9] *See Random House Unabridged Dictionary* 1556 (2d ed. 1993).

"provide" is so commonplace that U S WEST's own marketing scripts described U S WEST as a "long-distance . . . provider." Pet. App. 34a n.70.[10]

The legislative and judicial history of this provision likewise weighs strongly against U S WEST's crabbed construction. As the FCC observed (Pet. App. 52a-53a), the Conference Report for the 1996 Act uses "provide" as synonymous not with "transmit" but with "offer." And, as noted *supra* p. 4-5, the predecessor provision of the MFJ used the same word, "provide," in the same context, as synonymous not with "transmit" but with "marketing or selling." "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998). Moreover, because the court in the MFJ cases was construing the term "provide" *de novo*, U S WEST's contention that the D.C. Circuit erred in approving the FCC's interpretation of the same term in the same way as *reasonable* is particularly farfetched.

---

[10] U S WEST also contends (Pet. 20) that the FCC should have applied the same construction of the word "provide" that it employed in construing a different provision of the Act, 47 U.S.C. § 275, that deals with alarm monitoring. It is difficult to see how that would help U S WEST, for its conduct would be unlawful under either construction. In the alarm monitoring decision, the FCC did not define "provide" to mean "transmit." Instead, as U S WEST admitted below, the FCC held that "when an arrangement so 'intertwines' a BOC with an unaffiliated [alarm monitoring] provider as to result in a *de facto* affiliation between the two companies," the arrangement will violate § 275. Brief of Petitioners U S WEST et al. at 27, *U S WEST et al.* v. *FCC*, No. 98-1468 et al. (D.C. Cir., filed March 23, 1999) (quoting *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services*, 12 FCC Rcd. 3824 at ¶¶ 38-40). In any event, the court of appeals correctly found that the FCC acted properly in construing the term "provide" in Section 271 somewhat differently from the term "provide" in Section 275. Pet. App. 8a.

Finally, drawing the line at "transmission" would serve no conceivable statutory purpose. U S WEST does not even suggest such a purpose. Instead, it mischaracterizes the court of appeals' and the FCC's examination of the "overall purposes of the Act" (Pet. App. 3a) as the court and the FCC merely implementing their own views of "good policy." Pet. 23. But as Justice Scalia has explained (in the article cited by U S WEST, Pet. 13-14), "one of the most frequent justifications" for a court to "choos[e] a particular construction is that the alternative interpretation would produce . . . results less compatible with the reason or purpose of the statute. . . . Policy evaluation is, in other words, part of the traditional judicial tool-kit. . . ." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515 (1989).

Here, the court and the FCC correctly found that U S WEST's proposed definition of "provide" would thwart the policies Congress intended to advance. As the court of appeals explained, U S WEST's interpretation would "tempt the BOCs to defer conduct that Congress hoped to accelerate -- acts facilitating the development of competition in the [local] market", and would permit them to "position[] themselves in the [long distance] markets before § 271 allows them actually to enter." Pet. App. 6a, 7a. Further, the FCC properly found that permitting BOC entry into the long-distance market while local markets remained closed would mean "less long distance competition" because the BOCs would be able to "gain an unfair advantage against long distance carriers" in precisely the way Section 271 was designed to foreclose: in particular, by becoming the only carrier able to provide one-stop shopping throughout its region. Pet. App. 24a Indeed, the BOCs' own documents showed that they entered into these alliances for just

that reason. Pet. App. 28a & nn. 42, 43, 32a & n.60, 57a & nn. 129, 130. It thus required only the most traditional, garden variety exercise of statutory construction to find U S WEST's conduct unlawful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Mark C. Rosenblum
Roy E. Hoffinger
James H. Bolin, Jr.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

David W. Carpenter*
Peter D. Keisler
Daniel Meron
SIDLEY & AUSTIN
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7237

Counsel for Respondent AT&T Corp.

Donald B. Verrilli, Jr.
Jerome L. Epstein
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Thomas F. O'Neil III
MCI WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Counsel for Respondent MCI WorldCom, Inc.

January 24, 2000

* Counsel of Record